



THE INTERIM

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THE INTERIM

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THE INTERIM is a monthly newsletter that reports on the interim activities of legislative committees, including the Legislative Council, the Environmental Quality Council, the Legislative Finance Committee, the Legislative Audit Committee, and interim legislative committees and subcommittees staffed by the Legislative Services Division. Information about the committees, including meeting schedules, agendas, and reports, is found at <http://www.leg.mt.gov>. Follow the "Committees" link or the "Interims" link to the relevant committee. The newsletter is posted on the legislative branch website on the first of each month (follow the "Publications" link).

WATCH FOR A NEW SURVEY FROM THE U.S. CENSUS BUREAU

The Constitution of the United States requires a census of the nation's population every 10 years. The results of the census are used, among other purposes, to apportion seats in the U.S. House of Representatives and to redistrict state legislatures.

During the 2000 census, most households received a "short form," which contained seven basic questions, while one-in-six households received a "long form," which contained additional questions that provide the basis for ascertaining the socioeconomic and housing characteristics of the nation, states, cities, and communities. The U.S. Census Bureau, in an effort to streamline and improve the census, has developed the American Community Survey. The new survey will replace the long form and will provide communities with information every year instead of once every 10 years. One goal of the survey is to provide data to users within six months of the end of a collection or calendar year.

Starting in July 2004, one household out of 480 (better odds than the lottery) in every county and American Indian reservation in the nation will receive the survey each month, but no household will receive the survey more often than once every 5 years. Households on the Flathead Indian Reservation in Lake and Flathead counties have participated in the testing of the American Community Survey. Federal law requires a response to the survey, but responses are confidential and the information will only be used for statistical purposes.

Federal, state, and local officials as well as the private sector can use the information to "evaluate programs and to plan for the future." Montana communities may need this information to decide where to build roads or to plan for population changes such as the number of school-aged children or adults over 65. The annual updates can be used for a variety of purposes including helping federal, state, and local governments to more fairly distribute tax dollars that are allocated on funding formulas.

To learn more about the American Community Survey, go to www.census.gov/acs/www/. If you have questions or need additional information about the new survey, contact Susan Lavin, regional director of the Denver Regional Office, at (303) 969-6750.

CHILDREN, FAMILIES, HEALTH, AND HUMAN SERVICES COMMITTEE

Committee Authorizes Drafting of Agency Legislation...The Children, Families, Health, and Human Services Committee met in Helena on June 29 and 30. The Department of Public Health and Human Services presented its legislative proposals. The committee has requested the drafting of the proposals that have been approved by the governor; at the next meeting, the committee will review the agency's proposals that have not yet been approved by the governor or that require more information.

Committee Bill Draft Requests...The Committee has requested committee bill drafts for proposals that would:

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- allow the state to opt out of a federal provision in order to let drug felons receive public assistance under certain conditions;
- clarify the duties and authority of and access to confidential information by the mental health ombudsman;
- revise outdated language contained in the Montana Safe Haven Newborn Protection Act; and
- repeal the provisions of SB 473 (2003) because the recently enacted federal Medicare prescription law makes it unworkable as written.

Last Meeting of the Interim Scheduled for August...The committee has scheduled its final meeting of the interim for Aug. 27 in Room 102 the Capitol building. The committee will wrap-up its work on the SJR11 study of drug prevention, intervention, and treatment and will decide whether to create a chief drug prevention and treatment officer that would be attached to the governor's office. The committee will review the proposals from the governor's Methamphetamine Summit and will consider a legislative resolution that would encourage the governor and agency directors to continue intra-agency drug abuse prevention coordination in DPHHS and to continue the inter-agency cooperation between DPHHS and Department of Corrections on helping offenders in the correctional system move back into the community.

The committee will adopt its legislative package and approve a draft final report. Reports and information from prior meetings are available on the committee website and the agenda for the final meeting should be posted by mid-August.

For more information or to be put on the committee's mailing list, please contact Susan Byorth Fox, (406) 444-3597 or sfox@mt.gov.

LEGISLATIVE AUDIT DIVISION

The Legislative Audit Committee met June 22. The following audit reports were presented.

Contract Audit

Medical Legal Panel, Montana Supreme Court 04C-01...Under contract with the Legislative Auditor's Office, Henry Fenton, CPA, conducted the financial-compliance audit of the Medical Legal Panel for the year ended December 31, 2003. The auditor made no recommendations and gave an unqualified opinion on the medical panel's financial statements.

Information Systems Audit

Section 8 Housing, Department of Commerce 04DP-05...The Section 8 Housing Information System is used by the Department of Commerce Housing Assistance Bureau to administer the Section 8 Housing program. Section 8

Housing is a federally funded program providing subsidy payments for rent and utilities to landlords and property owners on behalf of low-income individuals and families. The audit of the information systems focused on the Housing Assistance Bureau's administration of the system in accordance with applicable federal guidelines and industry-accepted best practices. The report contains two recommendations addressing how the bureau can improve separation of duties for data input and evaluate user access privileges.

Performance Audits

Montana Highway Patrol, Highway Patrol Division, Department of Justice 03P-09...The audit report contains recommendations to help improve the Montana Highway Patrol's capability to efficiently and effectively conduct traffic enforcement and patrol operations. The recommendations include:

- increasing patrol time by identifying alternatives for low priority activities;
- increasing officer supervision and patrol by reducing sergeant administrative duties;
- redefining data collection requirements, methods, and analyses; and
- examining officer position descriptions and recruit qualifications.

Professional & Occupational Licensing, Business Standards Division, Department of Labor and Industry 04P-02/04P08...The audit report provides findings and recommendations relating to House Joint Resolution 20, which requested a series of performance audits of professional and occupational licensing boards administratively attached to the Department of Labor and Industry. Five aspects of professional and occupational licensing were examined:

- licensing fees and board funds;
- board disciplinary activities;
- department administrative procedures;
- public and professional representation on licensing boards; and
- education and experience requirements applied as a condition of licensure.

Next Meeting in September...The Legislative Audit Committee is scheduled to meet Sept. 28 in Room 137 of the Capitol building.

ECONOMIC AFFAIRS COMMITTEE

Forget August--See You in September...The Economic Affairs Committee decided at its July meeting to move its last meeting of this interim from Aug. 19 to Sept. 7 to allow more time for study committees and working groups to prepare legislation on workers' compensation and economic development. The meeting will start at 9:30 a.m. in Room 137 of the State Capitol.

The committee will give final review to two workers' compensation legislative proposals: responding to decisions by the Montana Supreme Court on occupational disease; and simplifying and clarifying statutes related to employee exclusions from workers' compensation requirements. These proposals are part of the SJR 17 study on the simplification and clarification of workers' compensation statutes. A draft report on the findings and recommendations of study will be presented in September. After the committee resolves remaining issues, a final report will be prepared for the 59th Legislature. At its July meeting, the committee approved two committee bills on workers' compensation clarification measures, which are available on the committee website in draft form as LC 5555 and LC 5560. (The LC numbers will change after the bill draft requests are logged in officially.)

The committee will also hear about the study on independent contractors required by SB 270 and the study on the role of the Montana State Fund required by SB 304. Any proposed legislation resulting from the studies may be provided for the committee's review.

Members of a working group on venture capital will present for consideration as a committee bill a proposal to encourage venture capital through deferred, contingent tax credits for investments in a Fund of Funds. The committee has requested the drafting of a resolution that would encourage the Governor's Office of Economic Opportunity to assist in the formation of groups of high-wealth investors, known as "angel" investors. These investors often provide key financing for early-stage companies that have the potential for high-growth returns or being listed on a stock market exchange.

Committee Requests Economic Development Bill Drafts...Draft legislation requested by the committee at its June 30-July 1 meeting includes four proposals promoted by the Montana Economic Developers Association:

- Reduce the tax rate from 3% to 1% on new industrial real and personal property (in class five property) and expand the definition of industries eligible for the lower tax rate.
- Revise 15-24-1402, MCA, to allow existing businesses to qualify for a local government property tax reduction if the businesses invest in significant expansions.
- Revise Title 39, chapter 11, parts 1 and 2, MCA, the Primary Sector Business Workforce Training Act (created by HB 564 in 2003) to streamline the review process and the process for demonstrating that a business has met its loan payoff

requirements; and to provide for more direct training ties with the colleges of technology.

- Revise 15-10-420, MCA, similar to HB 596, which died during the 2003 session, to allow local governments to impose a permissive levy of up to two mills for economic development under either 7-14-1131, MCA, or 90-5-112, MCA. The levy would not be subject to the mill levy cap.

Update from the Last Meeting...At its June 30-July 1 meeting, the State Auditor's Office, State Fund, and the Departments of Agriculture, Commerce, and Labor and Industry presented their legislative proposals. The Department of Livestock will give a brief update on its legislative requests at the September meeting.

Most but not all details of the June 30-July 1 meeting were reported in the July issue of **THE INTERIM**. A correction is in order, however, regarding a presentation on the Mariah wind tunnel project near Butte. Giving the presentation instead of Don Peoples were Jim Kambich from MSE-Technology Applications and Gloyd Simmons. The aerospace project, funded in part by a \$500,000 loan from the Montana Board of Investments and matched by \$500,000 in private money, involves hypersonic, advanced energy, and automatic control systems being developed and tested under government military contracts.

Representatives of insurance companies asked the committee not to propose legislation related to a Montana Supreme Court ruling on antistacking measures. The committee agreed not to request a committee bill.

Website Information...The agenda for the next meeting is on the committee website. For more information about the committee, contact Pat Murdo, committee staff, at (406) 444-3594 or by e-mail at pmurdo@mt.gov.

REVENUE AND TRANSPORTATION COMMITTEE

Sparring Over Confidentiality of Corp Tax Returns...Last December, the Montana Supreme Court, in *Great Falls Tribune v. Montana Public Service Commission*, held that the individual privacy exception to the public's right to know in the state constitution does not apply to a nonhuman entity. The fuss started when the *Great Falls Tribune* tried to obtain documents filed with the Public Service Commission by the Montana Power Company (now NorthWestern Energy) in conjunction with its default energy supplier obligations. The PSC had granted a protective order preventing the release of what MPC had claimed was confidential information. The *Great Falls Tribune* and other news media filed an action in district court seeking disclosure of the information. The district court judge ruled in favor of MPC, and the news media filed an appeal with the Supreme Court.

Lee Heiman, staff legal advisor, told the committee

that the Supreme Court held that:

- a corporation does not have a [constitutional] right to privacy;
- information that is a property right (such as a trade secret) is subject to due process protections against disclosure; and
- a grant of confidentiality must be determined case-by-case upon detailed application by a corporation and after independent review by the state agency.

The upshot of the decision, according to Heiman, was that, except for confidential property interests, documents relating to a nonhuman entity held by a public agency are required to be disclosed. Heiman said that a corporation license tax return is similar to the documents filed in the court decision, but it is unclear whether corporation tax returns are subject to the right-to-know provision of the constitution.

Section 15-31-511, MCA, provides for the confidentiality of corporation tax returns. Although the Department of Revenue had always maintained the confidentiality of these returns, 15-31-511, MCA, was enacted in 1993, in part, to conform with federal law that prohibits the release of information on federal tax returns.

Attorney John Alke, speaking on behalf of the Montana Taxpayers Association, said that the Supreme Court decision has no effect on the confidentiality of corporation tax returns; federal and state law prohibit the release of that information. Attorney John Shontz, representing the Montana Newspaper Association, countered by saying that under Montana's constitution, the public has a right to access information held by state and local governments. He suggested that the committee review the implications of the case on the confidentiality of corporation tax returns next interim to see whether other means are available to protect corporate information.

DOR Discusses Legislative Agenda...The Department of Revenue asked the committee to request 14 proposals to be drafted for introduction next session. Some of the proposals include:

- clarifying the payment of protested taxes by a centrally assessed company;
- clarifying the eligibility of land for valuation as agricultural land;
- allowing a taxpayer or DOR to take a property tax appeal directly to the state tax appeal board if a county tax appeal board fails to timely hear the appeal;
- conforming income tax filing and tax payment requirements with federal law for military personnel on active duty;

- providing for the recovery of a tax benefit when property donated to a charitable foundation is returned to the owner;
- if a court case is decided against the state, revising the residency requirements for obtaining a liquor license;
- allowing taxpayers to pay any tax owed to DOR with a credit card (now only individual income taxes and certain fees may be paid with a credit card);
- changing the distribution procedure for federal Taylor Grazing Act revenue; and
- clarifying the data source used to calculate the class eight property tax exemption "trigger".

The committee voted to request that all of the department's proposals be drafted for introduction.

MDT Presents Legislative Proposals...Eight initiatives proposed by the Department of Transportation (MDT) and requested by the committee will be drafted for introduction in the 2005 Legislature. The bills will address the makeup of the design-build advisory board, registration of trailers and semitrailers, motor fuels assessments, fleet registration, local option gas tax collections, and costs allowable to a landowner in a contested condemnation case. The committee also voted to request a bill to clarify where signs may be allowed along secondary roads. MDT's highest priority, however, is the drafting and enactment of legislation prohibiting open containers of alcohol in vehicles.

MDT asked the committee to request a bill identical to Senate Bill No. 39, which stalled and eventually died in the House Judiciary Committee during the 2003 session. The department told the committee it is renewing its request for open container legislation because of "documented safety concerns identified by NHTSA" (the National Highway Traffic Safety Administration) and the "possible loss of federal highway funds if a ban on open containers does not pass." MDT reported that existing "federal law calls for a percentage of highway dollars to shift to the safety program if no open container ban is in effect. The bill pending in the U.S. Senate calls for a 'hard sanction', or loss of funds, if a bill banning open containers in vehicles is not passed in 2005 or 2007."

In addition to reviewing MDT's legislative initiatives, the committee heard the regularly-scheduled report on highway safety, including the names and ages of the 35 individuals who died on Montana highways during the months of April and May, whether seatbelts were worn by those individuals, and whether alcohol was considered to be a factor in the fatalities.

Transportation Research Group Benefits Montana...A portion of the meeting was dedicated to the Western Transportation Institute (WTI), during which Steve Albert, WTI's director, presented an overview of the

institute's mission and areas of study. Based at Montana State University-Bozeman's College of Engineering, WTI was founded in 1994 by MDT and the California Department of Transportation to research the unique aspects of transportation in rural areas throughout the country. WTI is conducting research and demonstration projects in more than 30 states, focusing on rural applications of advanced technology, weather and winter mobility, highway infrastructure design and maintenance, public transportation and mobility, and transportation system-wildlife interactions aimed at reducing animal-vehicle collisions. Some of WTI's projects in Montana related to animal-vehicle collisions include evaluating the wildlife crossing structures on Highway 93 from Evaro to Polson; testing the effectiveness of animal detection systems that alert motorists to animals on or near a road; and producing a plan to mitigate animal-vehicle collisions along Highway 83 in the Seeley-Swan valley, particularly those involving white-tailed deer. Detailed information about WTI and its various areas of study is available at the institute's website: www.coe.montana.edu/wti.

Next Meeting is Scheduled for Sept. 9...The committee will meet Thursday, Sept. 9 in Room 137 of the state Capitol. For more information about the committee, please visit the committee's website or contact Jeff Martin at (406) 444-3595 or jmartin@mt.gov or Leanne Kurtz at (406) 444-3064 or lekurtz@mt.gov.

LEGISLATIVE COUNCIL

Council Meets in June...At its June 25 meeting, the Legislative Council:

- reviewed and approved for drafting legislation proposed by the Office of Budget and Program Planning and the Mental Disabilities Board of Visitors;
- received status reports on repairs to the Capitol, activities of the SJR 32 Subcommittee on Medical Liability Insurance, state revenue collections and expenditures, and recent court challenges to state statutes;
- received a staff briefing on the federal Census 2010 Redistricting Data Program, appointed Legislative Services Division staff to serve as liaisons to the U.S. Census Bureau, and agreed to participate in Phase II of the program;
- approved FY 2004 and FY 2005 operating plan adjustments to the Legislative Services Division budget;
- preliminarily approved 2007 biennium budget proposals providing funding for additional interim

committee meetings for review of agency legislation and for limited legislator participation in the activities of the Legislative Council on River Governance, Pacific Northwest Economic Region, National Conference of State Legislatures, and Council of State Governments;

- preliminarily approved the 2007 biennium legislative branch information technology budget as proposed by the Legislative Branch Computer System Planning Council; and
- requested that legislation be drafted for council sponsorship clarifying payment to legislators-elect for pre-session activities, simplifying payment of wages to session pages, revising the state's definition of "short-term workers" for legislative session purposes, reserving funds for replacement of the legislative branch's large-scale information technology equipment and systems, and requiring an estimate of the financial impact of proposed IT projects contained in the state budget on legislative, judicial, and executive branch agencies. The council also authorized the drafting of the Code Commissioner bill and the 2005 legislative feed bill.

The council's next meeting is scheduled for Sept. 17 in Room 137 of the state Capitol. The council may also meet on Sept. 16 to allow sufficient time to review the findings, recommendations, and proposed legislation from the SJR 32 Subcommittee. For more information about the Legislative Council, call Lois Menzies at (406) 444-3066 or send an e-mail to lomenzies@mt.gov

LAW AND JUSTICE COMMITTEE

Statewide Public Defender System...The primary focus of the Law and Justice Interim Committee has been to develop legislation that would create a statewide public defender system. A five-member subcommittee appointed to work on the legislation will finalize its recommendations at a meeting on Aug. 9 and present its recommendations and a bill draft to the full committee on Aug. 10. The full committee will continue to discuss the legislation, further consider fiscal implications, and take final action on the bill in September. The meeting is tentatively scheduled for Sept. 8 at the Capitol.

The preliminary bill draft for the statewide public defender system will be available on the Law and Justice Interim Committee website. The key provisions of the bill are:

- A public defender commission would develop statewide standards and adopt rules to govern the statewide public defender system, appoint a chief public defender, and oversee the operations of the Office of State Public Defender. The commission and office would be administratively attached to the

Department of Administration for certain support services.

- Statewide standards would address such things as public defender caseload maximums, training requirements, qualifications, access to support services, such as investigators and paralegals, and performance evaluations.
- The Office of State Public Defender would be responsible for hiring staff and contracting with private attorneys to provide public defender services throughout the state.
- The state public defender system would encompass district court and justice court cases in which a person is entitled to the assistance of counsel but who is determined to be indigent and unable to afford private counsel.
- The new agency would develop a standard procedure for the determination of indigence. However, the determination would be subject to court review if an applicant for public defender services disputed an unfavorable determination. The bill may contain a provision for a determination of "partial indigence" for defendants able to pay a portion of the defense costs.
- Employees in existing county public defender offices would become state employees. In the other counties, the state public defender would either hire staff or contract with private attorneys, firms, consortia, or non-profit corporations to provide public defender services. Judges would no longer make ad hoc case-by-case appointments, but would either assign the state public defender to handle the case or assign an attorney designated by the public defender.

Currently, public defender costs paid by the state through the Office of Court Administrator are between \$8 million and \$9 million. Additional costs for the implementation of the new statewide system, which would include personnel and operating costs of the new state office, a statewide training program, new information technology requirements, and state assumption of the public defender caseload in justice court, are expected to amount to several million dollars more. However, the fiscal data is still being analyzed and costs estimates have not been finalized. More information will be made available to the committee in August and September.

The Public Defender Subcommittee is meeting at 10 a.m., Aug. 9 in Room 152 of the Capitol. Staff will present the new bill draft and the subcommittee will take public comment and have a work session to discuss and revise the bill.

The full committee will meet at 8:30 a.m., Aug. 10 in Room 152 of the Capitol. It will receive the subcommittee's report, the bill draft will be presented by staff, and additional public comment will be taken. The committee will discuss and potentially revise the bill draft.

Final action will be taken by the committee at its last meeting, tentatively scheduled for Sept. 8 at the Capitol.

Juvenile probation...The committee is trying to determine whether the supervision of juvenile probation officers should remain with the judicial branch or be assigned to the executive branch as part of the SJR 31 study of the juvenile probation system.

At its May 20 meeting, the committee learned that in 22 states, including Montana, juvenile probation is administered by the judicial branch. Representatives of the judicial branch testified that juvenile probation should remain under the judiciary because juvenile probation officers are able to act as an extension of the youth court judge and the judicial process. They argued that this was an effective way to ensure youth were dealt with appropriately and that it prevented more youth from ending up in the formal correctional system.

In Montana, juvenile probation is organized by judicial district. Each youth court judge appoints a chief probation officer, who hires district office staff. All juvenile probation office staff are employees of the judicial branch under the judicial branch classification and pay plan. There are 91 juvenile probation officers statewide. In 2002, there were about 16,600 juvenile offenses and about 10,000 youth were referred to juvenile probation. About 8,500, or 85%, of those youth were handled through an informal adjudication process, with about 3,000 being placed on informal probation. Of those youth, a formal petition of delinquency was filed on about 1,400 youth, of which 135 were sentenced to the Department of Corrections for placement at Pine Hills or Riverside.

A key concern of the SJR 31 study is the supervision of juvenile probation officers to ensure that they do not violate parental rights when handling youth.

Representatives of the judicial branch testified that since July 1, 2003, when juvenile probation officers became state judicial branch employees rather than county employees, the judicial branch has developed statewide policies to address supervision and to provide parents with a formal grievance procedure. The committee is considering whether to make statutory changes to the Youth Court Act with respect to supervision.

More Information...For further information on the activities of the Law and Justice Interim Committee, contact Sheri Heffelfinger at (406) 444-3596 or go to www.leg.mt.gov and click on "Committees", "Interim", and "Law and Justice Interim Committee".

THE BACK PAGE

BALANCING ECONOMIC DEVELOPMENT AND INSURANCE PREMIUMS

The Impacts of Level Playing Fields, Competition, and Regulation

By Pat Murdo
Legislative Research Analyst

INTRODUCTION

The art and the science of achieving balance in legislating are especially critical in the areas of economic development and insurance—all kinds of insurance. Rising insurance premiums affect economic development, while economic development may also impact insurance premiums.

Businesses, homeowners, vehicle owners, doctors, and hospitals all see the hit from rising insurance premiums and worry about the effect on their pocketbook—whether they're charging for services, paying premiums, or both. What can be done about rising insurance premiums, if anything? Some people blame higher insurance premiums on low returns to insurance companies from the stock market. Others fault what they call frivolous lawsuits. Still others say that some insurance companies' management is akin to Aesop's grasshopper rather than the ant—relying on the stock market for high returns and gaming their competitors or seeking new, perhaps marginal, markets rather than tending to the business of calculating risk versus loss and pricing premiums accordingly. Finally, for insurance related to the health industry, new medical technologies contribute to higher costs. For workers' compensation, the higher costs of medical technologies turn into a double-cost whammy because these advances may lengthen life spans and, thus, some workers' comp payouts.

Whatever the cause, higher premiums are a national problem with local variations. Some states are being hit harder than others. How some states mitigate pocketbook and profit erosion is a question usually answered by the insurance community with "consistency of regulation", "limited mandates", and "tort reform". The following review of various kinds of insurance will touch on economic development, related legislative proposals in Montana, and activities elsewhere that are likely to affect premium rates.

HEALTH INSURANCE

The health care industry is one of Montana's major employers in large, regional centers as well as in small towns. When health care centers expand—a plus from an economic development viewpoint—health insurance or medical malpractice premiums may increase. Here's how. As hospitals or health care centers expand, they employ more people. They also may duplicate services already available in the same town or close by. That's competition, you say. Yes, however, Montana's population is limited. Although the

Billings area may draw in patients from Wyoming, this state's population in general looks to Missoula, Billings, or Great Falls for major health care services. Patients anticipating more complicated surgeries or health care needs often head to Seattle, Salt Lake, Denver, or Rochester, Minnesota. Although staffing in Montana may be somewhat flexible in general, a hospital that advertises the most up-to-date expertise in neurosurgery or cardiovascular surgery, for example, has to have the equipment and the basic staff to accompany the claims. Neither staffing nor equipment is cheap. Who pays? Usually insurance (including Medicare and Medicaid) and private payers. The more high-tech medical equipment in a town—accessible by the same population pool—the less likely that the charge for that equipment will drop because of competition. Staffing costs may actually rise as health care centers compete for nurses and other skilled personnel in a market in which shortages are unlikely to be resolved soon.

The Montana Legislature has attempted to control rising health care costs in the past by requiring certificates of need for various health care facilities. This program was designed to regulate growth in medical facilities as a way of limiting increases in health care costs and to provide an opportunity for public input on the siting of medical facilities. Although the Legislature enacted certificate of need (CON) legislation in 1967, it had removed most hospital-related CON requirements in the 1980s and 1990s. A study of CON use across states in the 2001-02 interim provided no direct evidence that the program helped to control costs or that its absence resulted in higher costs.¹ Nursing homes still must comply with CON requirements.

Proposals that deal with rising health insurance costs may be introduced in the 2005 legislative session. For example, the State Auditor's Office is proposing the Montana Healthcare Affordability Act—legislation that would provide a tax credit to businesses with 10 or fewer employees to help make the cost of their employees' health insurance more affordable. A survey by the University of Montana indicated that 67% of small businesses that currently do not offer health insurance might do so if a "significant" tax credit became available.² The Auditor's Office has said that if Initiative Measure No. 149 passes, which increases the cigarette tax by \$1 a pack (to \$1.70 a pack), some of that revenue would be used to

¹See D. Bohyer and G. Higgins, "Access and Barriers to Health Care: A Final Report of the SJR 22 Subcommittee of the Economic Affairs Interim Committee", December 2002, pp. 56-63 at http://leg.mt.gov/css/publications/committees/interim/2001_2002/final_reports.asp.

²Steve Seninger, "Household Survey and Employer Survey Findings about Health Insurance Coverage in Montana", Bureau of Business and Economic Research, University of Montana, February 2004, pp. 18-23 (<http://www.dphhs.mt.gov/hpsd/uninsured/healthreport.pdf>).

offset \$15 million a year in proposed tax credits.³ The public policy behind the state's involvement addresses concerns about cost-shifting, in which insurance companies and others who pay for health care (including the State of Montana through policies for its own employees and Medicaid) help cover the costs of those unable to pay. An increase in the number of people with health insurance would mean that health care providers would have less reason to cost-shift if fewer people were uninsured and more bills were being paid.

A working group composed of legislators, educators, insurers, the Governor's Office, and education associations is looking at ways to provide an insurance pool for K-12 employees. Under consideration by the working group is legislation similar to SB 228 proposed in 1997, which would have mandated participation for all public school employees in a pool. House Bill 302, introduced in 2003, died on the Senate floor after amendments that allowed participants to opt out were adopted.⁴

MEDICAL MALPRACTICE INSURANCE

Research⁵ has shown that performing more medical procedures tends to increase practitioner skills in many cases and, as a result, decrease the risk of poor outcomes; poor outcomes can lead to medical malpractice claims. Although doctors may encourage more procedures for a particular population base as the number of facilities expand (affecting health insurance premiums), the more likely case is that the number of procedures for each facility and for each staff will decrease on a statewide basis. Fewer procedures in any one place increase the potential for error in that place, which can affect medical malpractice premiums. So, although the rise in medical malpractice premiums is a problem nationwide, Montana's small population and rural nature may further hinder effective solutions. In other words, the medical malpractice crisis is not simply about tort reform (which Montana has undertaken—see below); it also involves the potential for actual malpractice, which includes volume and experience as well as a climate encouraging safety.

The Montana Legislature has enacted various features of tort reform, such as limits on noneconomic damages (pain and suffering) in 1995 (see 25-9-411, MCA) and periodic payments for future damages (see 25-9-412, MCA). For other Montana statutes related to efforts to combat rising

medical malpractice premiums (a recurring "crisis" that the Council of State Governments says has happened every 10 years or so since the 1970s⁶), see "Montana Medical Malpractice Liability Law" prepared for the SJR 32 Subcommittee on Medical Liability Insurance.⁷

The SJR 32 Subcommittee has proposed several options aimed at providing either support for liability insurance or changes in tort law regarding who can be sued. For more information about the activities of the Subcommittee, see the July 2004 issue of this newsletter. Draft proposals are available on the Subcommittee's website.

WORKERS' COMPENSATION INSURANCE

At a June 2004 Legislative Finance Committee meeting, Senator Jon Tester told Montana State Fund officials that he's hearing from people across Montana who contend that rising workers' compensation insurance premiums are impeding business growth. Are the complaints unique to Montana, he asked, or are they similar elsewhere? The answers are yes and yes, with qualifications. In addition, higher workers' comp rates are occurring partly because of Montana Supreme Court decisions. New legislation also could boost costs.

The Council of State Governments reports in its February 2004 Trends Alert "Workers' Comp" that, in general, fewer workers' compensation claims are being filed but that "workers' comp costs and benefits paid out are still rising". The costs, the report said, are increasing at double-digit rates across the country driven by: increases in medical expenses; investment income losses; effects of terrorism; slow economic growth; increasing fraud in the system; excessive litigation; and workforce demographics.⁸

Montana's workers' comp premiums are generally higher than in neighboring states as indicated by the relatively high ranking in certain fields shown in Table 1. Workers' comp premiums in North Dakota, Washington, and Wyoming, which have variations of monopolistic workers' compensation agencies, are typically much lower than Montana's. Premiums in Colorado, Oregon, Idaho, and Utah are also generally lower in each of the classes in which Montana ranked in the top 25 states. The table uses National Council on Compensation Insurance class codes but includes some adjustments because not all states have

³Montana State Auditor John Morrison's presentation to the Economic Affairs Interim Committee, June 30, 2004, Exhibit #10.

⁴See Minutes, K-12 Education Subcommittee of the Education and Local Government Interim Committee, January 9, 2004, for a review of proposals (http://leg.mt.gov/css/committees/interim/2003_2004/edu_local_gov/sub_com/k_12_edu/default.asp).

⁵See, for example, Steven W. Allen, et al., "Evidence-Based Referral Results in Significantly Reduced Mortality After Congenital Heart Surgery", *Pediatrics*, Vol. 112, No. 1, July 2003. A more general statement is in RAND, "Is Patient Volume a Useful Quality Measure for Very Low Birthweight Infants?", 2004, at www.rand.org.

⁶Council of State Governments, "Medical Malpractice Crisis", April 2003, revised May 2003 (<http://www.csg.org/CSG/Policy/health/default.htm>, see medical malpractice under issues).

⁷John MacMaster, "Montana Medical Malpractice Liability Law: A Report to the Subcommittee on Medical Malpractice Liability Insurance", November 2003 (http://leg.mt.gov/css/committees/administration/2003_2004/leg_council/sub_com/sjr32/default.asp).

⁸Melissa Taylor Bell and Irakli Khodeli, "Workers' Comp", The Council of State Governments, February 2004, Executive Summary, p. 1.

Table 1: Workers' Compensation Premium Rates, Ranked by Selected Class of Work Among Area States, 2002

	MT	ND	CO	WY	WA	OR	ID	UT
Farm: Nursery	\$9.61(4)	\$2.14(50)	\$6.69(10)	\$5.85(15)	\$3.02(45)	\$2.77(47)	\$5.11(23)	\$2.12(51)
Farm: Orchard	7.84(14)	4.36(42)	7.93(11)	3.32(50)	2.94(51)	6.13(27)	7.48(16)	3.73(47)
Farm: Field Crops	7.79(14)	4.36(43)	8.15(11)	3.32(49)	3.82(47)	6.18(25)	6.32(24)	4.20(45)
Farm: Cattle	15.5(4)	4.36(50)	12.47(8)	7.30(30)	8.11(26)	14.82(5)	12.13(9)	5.97(40)
Logging	31.73(23)	11.53(50)	26.14(28)	10.24(51)	21.32(35)	26.9(26)	25.2(32)	51.34(3)
Saw Mill	8.43(41)	11.53(17)	10.55(22)	4.46(50)	7.35(44)	6.70(46)	9.52(30)	6.70(45)
Carpentry Shop	12.36(3)	3.74(49)	8.42(17)	2.91(51)	4.95(42)	5.02(41)	9.66(11)	3.3(50)
Veneer Products Mfg.	4.54(42)	3.74(48)	7.03(17)	7.88(12)	5.36(39)	6.57(22)	4.88(40)	3.33(50)
Machine/ Equip. Repair	12.15(4)	3.26(51)	8.89(19)	4.53(49)	5.41(44)	8.29(23)	5.34(45)	5.67(41)
Excavation	17.6(1)	3.97(50)	11.01(7)	6.38(39)	8.05(26)	7.66(30)	5.64(44)	8.59(22)
Sand/Gravel Digging	12.97(5)	4.15(50)	11.29(10)	2.01(51)	4.47(48)	11.58(8)	8.51(25)	6.36(42)
Concrete Construct.	13.67(19)	4.64(51)	14.19(17)	5.91(50)	8.35(44)	8.9(41)	10.4(34)	6.53(48)
Painting	15.74(4)	4.93(50)	10.46(22)	6.38(45)	8.65(32)	10.08(25)	7.8(38)	5.78(48)
Roofing	51.54(4)	6.9(49)	27.97(18)	6.38(50)	18.83(38)	16.85(42)	24.81(24)	19.54(36)
Trucking-Local	12.36(17)	5.57(47)	15.37(5)	5.20(48)	8.10(37)	11.07(21)	9.28(29)	5.68(46)
Trucking-Long Distance	12.18(14)	5.57(49)	11.99(16)	5.20(50)	8.16(37)	11.07(19)	9.28(29)	9.39(28)
Wallboard Install.	23.4(2)	6.9(42)	11.37(17)	6.76(43)	12.36(12)	12.27(14)	8.46(32)	6.25(47)
Clerical/ Office	0.58(6)	0.18(49)	0.39(20)	0.39(18)	0.14(51)	0.24(41)	0.43(17)	0.21(47)

Source: Oregon Department of Consumer & Business Services, "Oregon Workers' Compensation Premium Rate Ranking, Calendar Year 2002", March 2003, Appendix 4. Premium rates are the dollar amount per \$100 of annual wages. National rank in parentheses. Includes District of Columbia. Shaded areas indicate a state with a premium rate in the top 10 ranking.

the same classifications. Caution must be used in interpreting this data because states may use different payroll estimates (for example, excluding vacation pay). In addition, the premiums shown in the table are not necessarily what each employer in that classification is paying. Premiums depend on an employer's experience rating, discounts, or other modification plans. The Montana

data used for this table is derived from rates and market share information of private workers' comp insurers and the Montana State Fund but does not include self-insurers. The State Auditor's Office reviews private workers' comp insurers' rates to determine whether they are "excessive, inadequate, or unfairly discriminatory", as provided in 33-16-101, MCA. The Legislative Audit Division reviews State Fund rates

under the same guidelines, as provided in 39-71-2362, MCA.

Table 1 raises questions. Are Montana workers more daring (reckless)? Are work conditions here more unsafe? What factors have boosted premium rates here? Are more worker safety training courses necessary or is the problem structural (as in demographics)? Studies assigned by the 58th Legislature may touch only indirectly on any of these questions. These studies include:

- SJR 17, a review of ways to clarify and simplify workers' compensation statutes;
- SB 270, a review of the independent contractor (IC) status. Montana has a higher than average number of ICs to average annual employment (8%), while other states with similar IC rules range from 0.6% in South Dakota to 2.4% in Florida.⁹ ICs are eligible to opt out of carrying workers' compensation coverage.
- SB 304, a review of the role of the State Fund and whether all or a portion of the State Fund should be sold and whether a high risk insurance pool should be created.

As these studies wind to a close, the matter of increasing premiums looms in the background. The SJR 17 study, for example, is looking at whether to incorporate Supreme Court decisions that ruled as unconstitutional some statutes that provide separate treatment of occupational disease and injuries under workers' compensation. Insurers already have incorporated these rulings into their rate structures. However, State Fund Executive Director Laurence Hubbard told the Economic Affairs Interim Committee in July of this year that retroactive application of the Supreme Court rulings to injuries occurring before July 1, 1990, could impact the Old Fund (and the state general fund) by as much as \$5 million to \$7 million. The court has not yet ruled on the retroactive applications.

A committee established by SB 304 and staffed by the Montana State Fund voted at its May 2004 meeting to propose a phased-in premium tax to be paid by the State Fund on all its premiums. Passing along the cost to the customer would amount to an increase for each State Fund premium payer (including the State of Montana) of 2.75% after 3 years. The tax would generate \$3 million to \$4 million that would go into the general fund. The SB 304 Committee's rationale is to create a more level playing field for other workers' compensation insurers who pay a 2.75% premium tax while the State Fund does not. From an economic development standpoint, more workers' compensation insurance companies might compete in Montana. Currently, Liberty Northwest and the State Fund are the main workers'

comp underwriters in Montana.

A committee established by SB 270 and staffed by the Department of Labor and Industry continues to look at how the status of an independent contractor is determined. Court rulings have said that a sworn statement is insufficient proof of independent contractor status if other factors demonstrate control by the hiring agent, such as being told what time to report to work or using tools provided by the hiring entity. Among costs under consideration by this Committee are provisions for enhanced enforcement activities, an educational component, and an improved database.

PROPERTY AND CASUALTY INSURANCE

In the summer of 2003, rising premiums for homeowners' insurance were the subject of a report given at a National Conference of State Legislatures meeting. That report cited as reasons for rising homeowners' insurance premiums a huge rise in underwriting losses. The year 2001 amounted to the worst year of payouts for homeowners' insurance ever recorded—more than \$27 billion. Also blamed were inflation in the prices of homes and home repair, new threats from "toxic" mold for which no premiums had been charged, rising reinsurance costs, attempts to weaken underwriting techniques through credit restrictions, and the old bug-a-boo—litigation.¹⁰ In Montana, rising rates in 2002 had caught the attention of the State Auditor's Office, which planned a review of insurance rates. However, the Deputy Insurance Commissioner in the State Auditor's Office, which regulates insurance in Montana, indicates that new homeowners' policies reflect no new hikes or, possibly, even lower rates.

Yet as the summer heat rises, so does the question of whether homeowners Montana will pay more if a home burns in a forest fire two ridges to the west. Representatives of insurance companies say that Montanans do not pay higher premiums when homes burn from forest fires in Arizona or California. However, that does not mean that Montanans might not pay higher premiums if homes burn in the wildland-urban interface here. One insurer, State Farm, has begun working with policyholders on a trial basis in Colorado and Arizona to reduce the wildland-urban interface risks. A *Missoulian* editorial commented regarding the State Farm program: "Large losses caused by wildfire ultimately mean higher insurance costs for everyone. It's only fair to expect homeowners living in fire-prone areas to do what they can to keep their risks to a minimum."¹¹

Property and casualty (P&C) insurance includes homeowners' insurance, commercial liability insurance, and motor vehicle insurance. (See Table 2 for selected insurance

¹⁰Robert Hartwig, "A Plague on Your Houses: What's Wrong With Homeowners Insurance Markets", Presentation at the National Conference of State Legislatures meeting, June 24, 2003.

¹¹"Insurers may provide needed incentive", *Missoulian*, June 29, 2004 (<http://www.missoulian.com/articles/2004/07/02/opinion/opinion6.prt>).

⁹Maggie Connor, "Independent Contractors in Montana", Montana Department of Labor and Industry, Employment Relations Division, presented to the SB 270 Committee, October 2003.

terms.) Among issues brought before the Economic Affairs Interim Committee this year and deferred for debate during the 2005 legislative session is the question of how to handle a Supreme Court decision that ruled as unconstitutional a portion of the antistacking legislation passed by previous Legislatures.

Table 2: Some Helpful Insurance Terms

Buying insurance and passing laws to regulate insurance involve a variety of terminologies

Captive insurance company	A company created by a noninsurance firm to provide a form of self-insurance.
Credit-scoring	A way that insurance companies rate a customer's potential to file claims based on the customer's use of credit and other factors.
Lines and surplus lines	A line is a type of insurance. Surplus lines are provided by "non-admitted" carriers, who are licensed by other states but not "admitted" as a usual insurer here. They provide unusual insurance, for example, insuring a movie star's legs.
NCCI	National Council on Compensation Insurance works with workers' compensation insurers to help review and forecast rates.
Property and casualty (P&C)	Vehicle, home, property insurance, also called liability insurance. Sometimes called third-party coverage. Covers injuries to people and damage to property, depending on policy.
Risk retention groups	Groups of companies allowed to band together as self-insurers under a federal 1981 law.

Under antistacking provisions, a policyholder cannot combine amounts from separate policies to cover liabilities. Essentially, the Legislature has linked policies to vehicles, not people. In *Hardy v. Progressive Specialty Insurance Co.*, 2003 MT 85, 315 Mont. 107 (2003), the Montana Supreme Court said that a provision prohibiting stacking in 33-23-203, MCA, was not rationally related to the Legislature's stated objective of maintaining affordable insurance in Montana "nor any other 'permissible legislative objective' and therefore constitutes an arbitrary and capricious action".¹²

Insurance company representatives have suggested that the *Hardy* case illustrates two problems related to insurance regulation in Montana:

- uncertainty regarding Supreme Court decisions; and
- the need for insurance companies to respond separately to each state's regulations because insurance is regulated on a state-by-state basis.

Providing a more certain business climate and more uniform regulation would be attractive to insurance companies and perhaps encourage more companies to offer policies in Montana, which in turn could help lower premium costs, these insurers say. Table 3 shows that as of January 2004, the State Auditor's Office had licensed 1,433 insurance companies of various types in Montana. This number is down from January 2001 when 1,446 companies were licensed.

Table 3: Insurance firms by type, licensed in Montana, 2001 and 2004

	1/1/2001	1/1/2004
Life/Health	578	530
Property/Casualty	776	788
Fraternal Organizations	26	24
Title	14	14
Risk Retention Groups	29	48
Health Service Corps.	3	2
Health Maintenance Organizations	4	2
Multiple Employer Welfare Arrangements (MEWAs)	4	4
Captives	0	9
Farm Mutuals	12	12
Total	1,446	1,433

State Auditor's Office, Presentation to the Economic Affairs Interim Committee, January 23, 2004, Exhibit #2.

A decrease in life and health insurance firms here has been offset partly by an increase in "captive insurance companies" allowed by SB 373 (enacted in 2001), more P&C firms, and more risk retention groups.

From a regulatory standpoint, states contend that consumer protection is better ensured by state rather than federal regulation of insurance. This year, at least nine states are considering or have considered ways to regulate credit scoring. Forty-eight states, including Montana, have some sort of credit scoring restrictions or guidelines. Credit scoring is a method by which insurance companies rate policyholders based partly on their geographic location, partly on their use of credit, and partly on demographic characteristics, but not necessarily on the policyholder's or applicant's own history of filing insurance claims.

¹²Letter from Staff Attorney Bart Campbell to the Economic Affairs Interim Committee, April 21, 2004.

In the 2005 legislative session, the State Auditor's Office will reintroduce credit scoring legislation similar to HB 184 in the 2003 session. The legislation seeks to provide a review of the models that insurance companies use to determine credit scores and to ensure that adverse actions taken by an insurer are not based on certain factors, including a policy applicant's lack of credit history, use of a particular debit or credit card, or a high number of inquiries about credit. The legislation also would require insurers to notify a consumer in writing about adverse actions based on credit history and require certain fixes for erroneous information.

The State Administration and Veterans' Affairs Interim Committee adopted a proposal for legislation to add a \$5 fee to vehicle liability insurance policies to help improve staffing for the Montana Highway Patrol.

NATIONAL APPROACHES

Insurance regulation falls within each state's purview, which is a source of irritation for insurance companies that operate nationwide and a source of pride for some state insurance regulators who see their role as protecting insurance consumers. Yet state regulators also see a need to help the insurance industry improve its ability to offer products (through speed-to-market regulations, among others). Similarly, efficient regulation and licensing are ways to decrease insurance companies' costs, which may translate to lower premiums.

The National Association of Insurance Commissioners (NAIC) has proposed an Interstate Insurance Compact that Montana's State Auditor's Office is including in its 2005 legislative requests. The compact would establish a

clearinghouse for review of certain insurance products (life, disability income, and long-term care) to make certain that these products meet uniform state standards.

In addition, the National Association of Insurance Commissioners has drafted a modernization proposal that the American Insurance Association considers incomplete without three principles:

- elimination of government price controls on rates;
- movement toward a standard, market-oriented form review system adopted by states (under file and use policies or informational filing approaches), plus permission for commercial lines to be exempt from a filing and review process for faster speed-to-market opportunities; and
- a national dispute resolution system.¹³

It is uncertain whether Montana will opt into the NAIC proposals. Unless federal legislation usurps the states' authority to regulate insurance, the Montana Legislature will remain responsible for creating the balance between competing interests, whether by adjusting the playing field or by altering the rules.

¹³NAIC Regulatory Modernization Roadmap "Not a Detailed Blueprint," Says AIA", from online Insurance Journal, published by Wells Publishing, Inc., June 15, 2004, <http://www.insurancejournal.com/news/national/2004/06/15/43244.htm>.



INTERIM CALENDAR

UNLESS OTHERWISE SPECIFIED, ALL ROOM DESIGNATIONS ARE IN THE CAPITOL

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
August 2004						
1	2	3	4	5	6	7
8	9 Law and Justice Public Defender Subcommittee, Room 152, 10 a.m.	10 Law and Justice Committee, Room 152, 8:30 a.m.	11	12	13	14
15	16 Legislative Council on River Govern- ance, Boise, ID	17 State-Tribal Rela- tions Committee, Room 137 Legislative Council on River Govern- ance, Boise, ID	18	19	20	21
22	23	24	25	26	27 Children, Families, Health, and Human Services Committee, Room 102	28
29	30	31				

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
September 2004						
			1	2	3	4
5	6 Labor Day--Holiday	7 Economic Affairs Interim Committee, Room 137, 9:30 a.m.	8 Law and Justice Committee, Room 102	9 Revenue and Trans- portation Committee, Room 137 Energy and Tele- communications, Room 102	10 Energy and Tele- communications, Room 102	11
12	13 Environmental Quality Council, Room 102	14 Environmental Quality Council, Room 102 Education and Local Government Com- mittee, Room 137	15 Education and Local Government Com- mittee, Room 137	16 Legislative Council, Room 137 (tentative)	17 Legislative Council, Room 137	18
19	20 Legislators Back to School Week, Sept. 20-24	21	22 Montana Heritage Commission, Virginia City	23	24	25
26	27	28 Legislative Audit Division. Room 137	29	30		

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